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Nos. 10-516, 10-528 and 10-533

In the Supreme Court of the United States

BOBBY J. RAST, DANIEL B. RAST, AND
RAST CONSTRUCTION, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

GRADY ROLAND PUGH, SR., AND
ROLAND PUGH CONSTRUCTION, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

JEWELL C. "CHRIS" MCNAIR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the federal-funds corruption statute, 18 U.S.C. 666, requires proof that a specific payment was solicited, received, or given in exchange for a specific official act.

2. Whether the court of appeals correctly concluded that petitioners failed to establish either that any false testimony was presented at trial or that the prosecutor knew that any testimony was false.

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In the Supreme Court of the United States

No. 10-516

BOBBY J. RAST, DANIEL B. RAST, AND
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UNITED STATES OF AMERICA

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No. 10-533

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-186) is reported at 605 F.3d 1152.[1]

JURISDICTION

The judgment of the court of appeals was entered on May 12, 2010. Petitions for rehearing were denied on July 20, 2010 (Pet. App. 196-197). The petition for a writ of certiorari in No. 10-516 was filed on October 14, 2010, and the petitions for a writ of certiorari in Nos. 10-528 and 10-533 were filed on October 18, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following four separate jury trials in the United States District Court for the Northern District of Alabama, petitioners were convicted on multiple counts of bribery concerning a program receiving federal funds, in violation of 18 U.S.C. 666(a), conspiracy to commit bribery, in violation of 18 U.S.C. 371, and related offenses. Following a guilty plea in a fifth case, petitioner McNair was also convicted on one additional count of conspiracy to commit bribery. Petitioner Bobby Rast was sentenced to 51 months of imprisonment, to be followed by three years of supervised release, and was fined $2.5 million and ordered to pay restitution. Petitioner Danny Rast was sentenced to 41 months of imprisonment, to be followed by three years of supervised release, and was fined $1 million and ordered to pay restitution. Petitioner Rast Construction, Inc. (Rast) was sentenced to 60 months of probation, was fined $1,702,500, and was ordered to pay restitution. Peti-

[1] Unless otherwise specified, all references to "Pet." and "Pet. App." are to the petition and appendix in No. 10-516.

tioner Grady Roland Pugh, Sr. (Roland Pugh) was sentenced to 45 months imprisonment, to be followed by two years of supervised release, and was fined $250,000. Petitioner Roland Pugh Construction, Inc. (Pugh) was sentenced to 60 months of probation, was fined $19.4 million, and was ordered to pay restitution. Petitioner McNair was sentenced to 60 months of imprisonment, to be followed by two years of supervised release, and was ordered to pay restitution. F.W. Dougherty Engineering & Associates, Inc. (FWDE) was sentenced to 60 months of probation, was fined $3,830,760, and was ordered to pay restitution; its principal Floyd "Pat" Dougherty was sentenced to 51 months of imprisonment, to be followed by three years of supervised release, and was fined $750,000 and ordered to pay restitution.[2] The court of appeals reversed one of Pugh's convictions and remanded for resentencing, but it affirmed in all other relevant respects. Pet. App. 1-186.

1. a. In 1996, McNair—one of five elected commissioners in Jefferson County, Alabama—was responsible for overseeing the Jefferson County Environmental Services Department (JCESD), which at that time began a $3 billion repair and rehabilitation of the county's sewer system. Pet. App. 3-4, 12-14. While most of the sewer construction contracts were awarded through a bidding process, McNair had to approve the contractors' pay requests, any change orders or contract modifications, and no-bid emergency work. *Id.* at 11-12. McNair also selected consulting engineers who were hired under no-bid contracts. *Id.* at 14.

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[2] Although the Dougherty defendants did not file a petition for a writ of certiorari, they filed a letter with this Court requesting status as persons entitled to relief under Rule 12.6 should the Court grant the petitions that were filed.

McNair owned a photography studio and undertook a major renovation and expansion of it not long after the sewer project began. During the sewer project, McNair approved hundreds of millions of dollars in payments to the Pugh, Rast, and Dougherty defendants, approved millions of dollars in change orders benefitting Pugh and Rast, and approved millions of dollars of no-bid engineering contracts to FWDE, while those defendants contributed materials, labor, and cash to his studio's renovation. Pet. App. 11-16. For example, FWDE provided one of its employees as a full-time "construction superintendent" to oversee construction on the studio by numerous contractors including Pugh and Rast. The $74,240 that FWDE paid the employee for supervising studio construction was recorded on FWDE's books as administration or JCESD sewer-project expenses. *Id.* at 17. Similarly, Pugh provided the concrete and labor to build the walls for the studio, and it paid four of its employees over $11,000 for the work. *Ibid.*; see *id.* at 19-20 (Pugh provided steel for the studio and sent a bill, which FWDE approved, to JCESD).

At McNair's request, Grady Pugh—Roland Pugh's son and, at the time, the CEO and a co-owner of Pugh—flew McNair's daughter to Georgia in the company's airplane and paid a deposit for carpet for his studio. Pet. App. 20. Pugh treated the payment as an expense on one of its JCESD sewer contracts. *Ibid.* McNair also asked Roland Pugh to pay for the studio's $40,000 heating and air-conditioning system, and Roland had his son Grady Pugh deliver an envelope containing cash to McNair. *Id.* at 21 n.13. On at least one other occasion, Grady delivered a cash-filled envelope to McNair at Roland Pugh's direction in response to a McNair solici-

tation. *Ibid.* Roland explained to his son that "this [is] how we do business." 1/10/2007 Tr. 713.

Shortly after McNair's retirement in 2001, Roland Pugh told Grady that McNair had asked him to build McNair a retirement home in Arkansas. Pet. App. 24. Roland explained, "surely this is the last time we'll have to do anything for him since he's out of office." *Ibid.* Later that year, Pugh paid an Arkansas contractor more than $44,000, and FWDE paid that contractor $50,000, toward the construction of McNair's retirement home. *Id.* at 24 & n.15. The suspicious circumstances under which Dougherty had his bookkeeper write the contractor's check caused the bookkeeper to keep a copy of the paperwork at home. When FWDE was later subpoenaed for those documents, the bookkeeper's copy was the only one available. *Ibid.*

b. At about the same time that McNair decided to renovate and expand his studio, JCESD Director Jack Swann decided to renovate and expand his house. Swann received hundreds of thousands of dollars in the form of labor and materials for his renovation project from the contractors that he oversaw. Pet. App. 33-34. During that period, the contractors received significant benefits from Swann. Swann recommended engineering firms, like FWDE, to McNair and negotiated their no-bid contracts. *Id.* at 31-32. Swann also approved payments and granted extensions of time and field directives, which authorized changes or additional work. For example, in March 2000 Pugh requested a 120-day extension on one of its contracts to avoid a $1000 per day liquidated-damages clause. Swann denied the request. Subsequently, nearly a month after the contract's completion date, Pugh renewed its request, this time for a 180-day extension. Five days after Pugh hired a con-

tractor to landscape Swann's property, Swann granted the request. *Id.* at 32; see also *id.* at 32-35 (Swann relieved Rast from its peformance bond, netting Rast millions of dollars, and Rast performed over $54,000 in construction work at Swann's house).

After the government's investigation became public, Bobby Rast told his bookkeeper they "didn't need" any invoices in their files with either McNair's or Swann's address on them. The bookkeeper thereafter discarded several such invoices. Pet. App. 19. Rast also amended several years of tax returns to delete more than $140,000 in payments it made for the McNair and Swann renovations that it originally had deducted as sewer project expenses. *Id.* at 18. Similarly, after hearing of the investigation and to account for its landscaping payments, Pugh sent a $12,572 invoice to Swann's mother-in-law for tree removal and remolding work. *Id.* at 37.

c. McNair and Swann's subordinates included JCESD's Chief Civil Engineer Ronald Wilson, Assistant Director Harry Chandler and Engineer Donald Ellis. Those officials approved the contractors' payments and authorized field directives and were also members of a committee that set technical standards for the sewer project. Pet. App. 13, 43.

The Pugh, Rast, and Dougherty defendants gave goods, labor, and cash to Chandler and Ellis. Pet. App. 25. Pugh provided crews and paid for the materials for extensive landscaping at Chandler's home. *Ibid.* Pugh's president also paid for a condo rental for the Chandler family's vacation at a Florida resort, while FWDE gave Chandler tickets to Disney World. *Id.* at 25-26. And Bobby Rast gave Chandler $5000 in cash to split with Ellis. *Id.* at 26.

In mid-1999, Wilson told Grady Pugh that he might not be able to afford his son's upcoming college semester, which prompted Grady to offer a "scholarship" for Wilson's son. Pet. App. 45. In July 1999, Pugh submitted a request for an extension of time on a contract with a past-due completion date of May 11, 1999. That request sat on Wilson's desk for nearly a month, until Wilson faxed Grady a letter explaining how Grady should credit $4500 to Wilson's son's college account. Three days later, Wilson approved Pugh's extension request; Pugh sent a $4500 check to the college the next day. *Id.* at 43.

d. Clarence Barber, JCESD's construction maintenance supervisor, oversaw the county's 26 inspectors and administered "emergency" sewer work—jobs that needed immediate attention and that were awarded on a no-bid basis. Pet. App. 13-14, 48. In January 2000, Barber decided to replace a set of sewer pipes on an emergency basis instead of repairing them. Eventually, Pugh was awarded an $857,000 no-bid contract on which it made a 50% profit. *Id.* at 49. Later that spring, Barber asked Pugh's president, Eddie Yessick, to buy him a lot on which he could build a retirement home. Yessick eventually put a down payment on a $47,500 lot in the name of Roland Pugh. Before closing, however, Yessick was told to close the transaction in Barber's name, not Roland's, and to get back from the realtor all documents referring to Pugh. Pugh thereafter gave Barber a cashier's check for $46,877 on which the "name of remitter" line was left blank. *Id.* at 50.

2. A grand jury in the Northern District of Alabama returned a 127-count indictment charging 16 defendants with bribery concerning a program receiving federal funds, in violation of 18 U.S.C. 666(a), conspiracy to

commit bribery, in violation of 18 U.S.C. 371, honest-services mail fraud, in violation of 18 U.S.C. 1341 and 1346, and obstruction of justice, in violation of 18 U.S.C. 1503. The indictment was severed into five separate cases for trial, and McNair entered a conditional plea of guilty to one count of conspiracy to accept a bribe. Pet. App. 7-9.

At the various trials, petitioners, for the most part, did not dispute that they gave the things of value charged in the indictment. Pet. App. 26-27. Rather, they argued that they gave those things only out of friendship and therefore lacked corrupt intent. *Id.* at 27, 38. They also argued that 18 U.S.C. 666 requires proof of a specific *quid pro quo*, that is, proof that a specific payment was solicited, received, or given in exchange for a specific official act. They argued that the indictment was deficient for failing to allege any specific *quid pro quo* and that the courts were required to charge the juries that the government had to prove a specific *quid pro quo*. Pet. App. 27, 52; see *id.* at 71 n.46.

In the first of petitioners' cases to be tried, the district court concluded that Section 666 does not require a specific *quid pro quo* and refused to give petitioners' proposed instructions. It did, however, instruct the jury that the statute "does not prohibit all gifts by or to a public official, * * * but only gifts received with the corrupt intent to be influenced or rewarded * * * in connection with a business or transaction or series of transactions of that governmental entity involving $5,000 or more." Pet. App. 76. In the subsequent cases, the courts gave similar instructions. *Id.* at 71-76 & n.52. The juries found petitioners guilty on multiple counts.

3. Nine separate defendants in four of the trials filed a total of 15 appeals, which the court of appeals

consolidated.[3] The court reversed one of Pugh's conspiracy convictions on the basis of the statute of limitations, and it remanded for resentencing. It also vacated the fine imposed on Swann and remanded for reconsideration of the amount of the fine. In all other respects, the court of appeals affirmed. Pet. App. 1-186.

The court of appeals held that the district courts had not erred in refusing to instruct the jury that it was required to find that a specific payment was solicited, received, or given in exchange for a specific official act. The court noted that Section 666 contains neither the term *quid pro quo* nor similar "language such as 'in exchange for an official act' or 'in return for an official act.'" Pet. App. 59. Instead, the court observed, the statute requires, for the county employees, that the defendant "'corruptly' accepted 'anything of value' with the intent 'to be influenced or rewarded in connection with any business, transaction, or series of transactions' of the County," and for the contractors, "that the defendant 'corruptly' gave 'anything of value' to a County employee with the intent 'to influence or reward' that person 'in connection with any business, transaction, or series of transactions' of the County." *Id.* at 60-61 (quoting 18 U.S.C. 666(a)).

The court of appeals noted that its interpretation of the statute was consistent with the Sixth Circuit's decision in *United States* v. *Abbey*, 560 F.3d 513, 520, cert. denied, 130 S. Ct. 739 (2009), and the Seventh Circuit's decisions in *United States* v. *Gee*, 432 F.3d 713, 714-715 (2005), cert. denied, 547 U.S. 1113 (2006), and *United States* v. *Agostino*, 132 F.3d 1183, 1189-1190 (1997), cert.

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[3] The convictions from the fifth trial were separately appealed. *United States* v. *US Infrastructure, Inc.*, 576 F.3d 1195 (11th Cir. 2009), cert. denied, 130 S. Ct. 1918 (2010).

denied, 523 U.S. 1079 (1998). Pet. App. 62-63. The court also found support in the Second Circuit's decision in *United States* v. *Ganim*, 510 F.3d 134, 142, 147 (2007) (Sotomayor, J.), cert. denied, 552 U.S. 1313 (2008), which concluded that Section 666 prohibits covered state and local officials from corruptly accepting things of value with the intent of performing official acts "as the opportunities arise." Pet. App. 63-64. The court noted that the Fourth Circuit has construed the statute to require a "course of conduct of favors and gifts flowing to a public official *in exchange for* a pattern of official actions favorable to the donor," *id.* at 63 (quoting *United States* v. *Jennings*, 160 F.3d 1006, 1014 (1998)) but it explained that, even under that standard, "the evidence here was sufficient, and thus any jury charge error was harmless," *id.* at 85 n.59.

The court of appeals rejected petitioners' suggestion that this Court's decision in *United States* v. *Sun-Diamond Growers of California*, 526 U.S. 398 (1999), requires a contrary result. In *Sun-Diamond*, this Court interpreted the illegal-gratuities provision of 18 U.S.C. 201, which prohibits gratuities given or received "for or because of any official act performed or to be performed." 18 U.S.C. 201(c). The Court held that the statute required "that some particular official act be identified and proved." 526 U.S. at 406. The court of appeals recognized that the Court had contrasted Section 201(c) with 18 U.S.C. 201(b), a bribery provision that the Court described as requiring a *quid pro quo*. Pet. App. 67 (quoting *Sun-Diamond*, 526 U.S. at 404). But it noted that "there are significant differences in the text of" Sections 201 and 666. *Id.* at 65. The court thus agreed with the Second Circuit's conclusion that there is no "principled reason to extend *Sun-Diamond*'s holding

beyond the illegal gratuity context." *Id.* at 69 (quoting *Ganim*, 510 F.3d at 146).

Finally, the court of appeals rejected the claim that the prosecutor knowingly used false testimony to secure Roland Pugh's conviction. The court concluded that petitioners had failed to show that any testimony was false, that the prosecutor knew it was false, or that any of the alleged falsehoods were material. Pet. App. 107-120.

ARGUMENT

Petitioners contend (Pet. 21-32; 10-533 Pet. 17; 10-528 Pet. 18-20) that the district courts erred in failing to instruct the juries that petitioners could not be convicted of bribery under the federal-funds corruption statute, 18 U.S.C. 666, unless, at the time money or other things of value changed hands, they had already identified the specific official action or actions they corruptly intended to influence or to be influenced in. Petitioner Roland Pugh also argues (10-528 Pet. 21-24) that the prosecutor knowingly presented false testimony at his trial. The court of appeals correctly rejected those claims, and further review is not warranted.

1. Petitioners argue (Pet. 21-32; 10-533 Pet. 17; 10-528 Pet. 18-20) that a conviction under Section 666 requires the government to prove a "specific" *quid pro quo*—that is, that a specific thing of value was solicited, received, or given in exchange for an identifiable official act. That argument lacks merit.

Section 666 makes it unlawful for an agent of a local government receiving federal funds to "corruptly solicit[] or demand[] * * * or accept[] or agree[] to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions" of the

local government involving $5000 or more. 18 U.S.C. 666(a)(1)(B). It also makes it unlawful to "corruptly give[], offer[], or agree[] to give anything of value to any person, with intent to influence or reward" such an agent "in connection with any business, transaction, or series of transactions" of the local government involving $5000 or more. 18 U.S.C. 666(a)(2). The court of appeals correctly concluded that nothing in Section 666 "requires that a specific payment be solicited, received, or given in exchange for a specific official act." Pet. App. 59. If the rule were otherwise, the court observed, a corrupt contractor could "pay a significant sum to a County employee intending the payment to produce a future, as yet unidentified favor without violating" the statute. *Ibid.*

a. Petitioners assert (Pet. 7-8; 10-533 Pet. 14-17; 10-528 Pet. 18-21) that the decision below is inconsistent with *United States* v. *Sun-Diamond Growers of California*, 526 U.S. 398 (1999), but that is incorrect. In *Sun-Diamond*, this Court interpreted the illegal-gratuity statute, 18 U.S.C. 201(c)(1)(A), which prohibits "giv[ing] * * * anything of value to any public official * * * for or because of any official act performed or to be performed by such public official." In concluding that Section 201(c) requires an illegal gratuity to be connected to "some particular official act," rather than to be given solely because of the recipient's official position, the Court emphasized that a contrary interpretation would cause "peculiar results," such as criminalizing "token gifts to the President based on his official position and not linked to any identifiable act." 526 U.S. at 406.

As the Court emphasized in *Sun-Diamond*, however, bribery statutes contain a *mens rea* different from that of the gratuity statute, requiring a corrupt intent to in-

fluence or to be influenced. 526 U.S. at 404. Because Section 666 requires proof of a "corrupt" intent, the court of appeals correctly observed that its interpretation of that provision, unlike the interpretation of Section 201 rejected in *Sun-Diamond*, would not criminalize "acceptable business practices." Pet. App. 60; see *id.* at 68-69. Accordingly, no "principled reason" exists to extend *Sun-Diamond* "beyond the gratuity context" and apply it to Section 666. *United States* v. *Ganim*, 510 F.3d 134, 146-147 (2d Cir. 2007) (Sotomayor, J.), cert. denied, 552 U.S. 1313 (2008); accord *United States* v. *Abbey*, 560 F.3d 513, 521 (6th Cir.), cert. denied, 130 S. Ct. 739 (2009).

Nor does the *Sun-Diamond* Court's discussion of *quid pro quo* cast doubt on the reasoning of the court below. In *Sun-Diamond*, the Court noted that the bribery provisions in Section 201 require an "intent 'to influence' an official act or 'to be influenced' in an official act," in other words, a "*quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act." 526 U.S. at 404-405. Petitioners seize on that language to argue that bribery under any statute requires a specific *quid pro quo*. Pet. 12 ("*Sun-Diamond* * * * expressly defined 'bribery' for purposes of Federal criminal law."); 10-528 Pet. 18-20; 10-533 Pet. 16-17. But *Sun-Diamond* did not involve, and thus did not address, the question whether bribery can be established by an intent to exchange something of value for official acts, even where the official acts to be undertaken have not yet been determined. And this Court has not required a specific *quid pro quo*, as suggested by petitioners, in the context of other bribery statutes. For example, in defining bribery for purposes of 18 U.S.C. 1346, the Court has cited with approval de-

cisions upholding convictions in cases where bribes were given in exchange for a stream of future benefits, even though the specific official acts to be performed had not been identified at the time the bribes were given. See *Skilling* v. *United States*, 130 S. Ct. 2896, 2934 (2010) (citing *Ganim*, 510 F.3d at 147-149, and *United States* v. *Whitfield*, 590 F.3d 325, 352-353 (5th Cir. 2009), cert. denied, 131 S. Ct. 124, 131 S. Ct. 134, and 131 S. Ct. 136 (2010)).

Petitioners are therefore asking this Court to adopt a narrowing construction of Section 666 that lacks support in *Sun-Diamond* or any language in the statute. This Court has previously declined to place such nontextual limits on Section 666. For example, in *Salinas* v. *United States*, 522 U.S. 52 (1997), the Court concluded that "[t]he enactment's expansive, unqualified language, both as to the bribes forbidden and the entities covered," and especially "[t]he word 'any,' which prefaces the business or transaction clause, undercuts the attempt to impose [petitioner's] narrowing construction" that would have limited Section 666 bribes to only those affecting federal funds. *Id.* at 56-57. Likewise, in *Sabri* v. *United States*, 541 U.S. 600 (2004), the Court observed that Congress chose to protect the funds it disburses to state and local government agencies by ensuring "the integrity of the state, local, and tribal recipients of federal dollars." *Id.* at 605. The Court explained that "bribed officials are untrustworthy stewards of federal funds," noting that "officials are not any the less threatening to the objects behind federal spending just because they may accept general retainers." *Id.* at 606. If this Court were to impose a specific-official-act requirement on Section 666, such "general retainers" are precisely what the statute would allow.

b. The courts of appeals have uniformly upheld convictions under Section 666 in cases involving an intent to exchange something of value for official acts, even where the official acts to be undertaken have not been determined with precision. See *United States* v. *Sawyer*, 85 F.3d 713, 730 (1st Cir. 1996); *Ganim*, 510 F.3d at 141-142; *United States* v. *Kemp*, 500 F.3d 257, 282 (3d Cir. 2007), cert. denied, 552 U.S. 1223 (2008); *United States* v. *Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998); *Abbey*, 560 F.3d at 519; *United States* v. *Gee*, 432 F.3d 713, 714-715 (7th Cir. 2005), cert. denied, 547 U.S. 1113 (2006); *United States* v. *Kincaid-Chauncey*, 556 F.3d 923, 943 & n.15 (9th Cir.), cert. denied, 130 S. Ct. 795 (2009). Like the court of appeals in this case, other courts of appeals have concluded that the intent—or *quid pro quo*—element is exactly what the express language of the statute says: a corrupt intent to influence or reward a government employee in connection with any business or transaction of the government agency. See, *e.g.*, *Abbey*, 560 F.3d at 521; *United States* v. *Ford*, 435 F.3d 204, 213 (2d Cir. 2006). As the Seventh Circuit has explained, "[a] *quid pro quo* of money for a specific legislative act is *sufficient* to violate [Section 666], but it is not *necessary*. It is enough if someone 'corruptly solicits * * * anything of value from any person, intending to be influenced or rewarded in connection with any business.'" *Gee*, 432 F.3d at 714-715.

Contrary to petitioners' assertion (Pet. 21-25; 10-533 Pet. 17-18), the decision below does not conflict with the Second Circuit's decision in *Ganim* or the Fourth Circuit's decision in *Jennings*. As the court of appeals correctly noted, both cases approved a retainer, or stream-of-benefits, theory of liability that is consistent with both the holding and evidence in this case. Pet. App. 63-

65, 84-85 n.59. Thus, in *Ganim*, the court concluded that in order to prevent "legaliz[ing] some of the most pervasive and entrenched corruption," a jury "need not find that the specific act to be performed was identified at the time of the promise." 510 F.3d at 147. Rather, it held, Section 666 must be interpreted to reach "a scheme involving payments at regular intervals in exchange for specific officials acts as the opportunities to commit those acts arise." *Ibid.* The *Jennings* court similarly concluded that Section 666 reaches "payments * * * made with the intent to retain the official's services on an 'as needed' basis, so that whenever the opportunity presents itself the official will take specific action on the payor's behalf." 160 F.3d at 1014. Accord *Kincaid-Chauncey*, 556 F.3d at 943 n.15 ("It is sufficient * * * if the evidence establishes that the government official has been put on 'retainer.'"); *Kemp*, 500 F.3d at 281-282; *Sawyer* 85 F.3d at 730.[4]

In any event, this case would be a poor vehicle for resolving any alleged conflict over the intent element of Section 666 because, as the court of appeals noted, the overwhelming evidence at the trials was sufficient to uphold the convictions under the approaches taken by other circuits, and thus any error in the jury instructions was harmless. Pet. App. 84-85 n.59. Accordingly, resolution of the supposed conflict would not affect the ultimate outcome of this case.

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[4] Petitioners err in suggesting (Pet. 25-27, 10-528 Pet. 16-17) that the decision below conflicts with *United States* v. *Griffin*, 154 F.3d 762 (8th Cir. 1998), and *United States* v. *Mariano*, 983 F.2d 1150 (1st Cir. 1993). Those cases involved application of the Sentencing Guidelines provisions concerning bribes and illegal gratuities; the courts had no occasion to consider the elements of an offense under Section 666.

2. McNair contends (10-533 Pet. 18) that, "although ostensibly holding only that no *specific* quid pro quo need be found for a conviction under § 666, the Eleventh Circuit actually held that *no* quid pro quo need be shown for a conviction under § 666." That is incorrect. The court of appeals "expressly [held] there is no requirement in § 666(a)(1)(B) or (a)(2) that the government allege or prove an intent that a *specific* payment was solicited, received, or given in exchange for a *specific* official act." Pet. App. 60 (emphasis added). That is the sense in which the court rejected a *quid pro quo* requirement. It instead aligned itself with courts that permit the *quo* to be satisfied by "an unidentified, official act at some point in the future." *Id.* at 65.[5] While the Eleventh Circuit did not adopt the term *quid pro quo*, its holding comports with decisions of other courts of appeals that "use the term *quid pro quo* to describe an exchange other than a particular item of value for a particular action," *ibid.*, and that describe an intent to be influenced as a *quid pro quo*. See *Ford*, 435 F.3d at 213 (explaining that the requirement of "accept[ing] the thing of value while 'intending to be influenced'" constitutes "a *quid-*

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[5] As the court explained:

> [N]othing in the plain language of § 666(a)(1)(B) nor § 666(a)(2) requires that a specific payment be solicited, received, or given in exchange for a specific official act. To accept the defendants' argument would permit a person to pay a significant sum to a County employee intending the payment to produce a future, as yet unidentified favor without violating § 666.

Pet. App. 59. The court repeatedly referred to its holding as a rejection of any requirement of a "specific" *quid pro quo*, summarizing its holding as "[s]imply put, the government is not required to tie or directly link a benefit or payment to a specific official act by that County employee." *Id.* at 61.

pro-quo"); *Kincaid-Chauncey*, 556 F.3d at 944-945 (concluding that in the jury instruction in an honest-services-fraud case based on bribery, the words "[i]f * * * the official accepts something of value with an intent to be influenced" contain "an implicit *quid pro quo*").[6]

Because the court of appeals merely rejected petitioners' argument that Section 666 requires proof of a specific *quid pro quo*, McNair's claims that Section 666 is void for vagueness (10-533 Pet. 24-26) and that the jury charges that were patterned on the language of Section 666 were erroneous (10-533 Pet. 26-27), are incorrect.[7] No court has declared Section 666 void for vagueness or disapproved of jury instructions that track the statute's

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[6] Petitioners' complaints about the court's definition of the term "corruptly" (Pet. 35, 10-533 Pet. 35) overlook that the court's definition was virtually identical to every definition offered in defendants' proposed jury instructions. Compare, *e.g.*, Pet. App. 73 (quoting definition of "corruptly" given by the district court), with 10-528 Pet. 13 (quoting Pugh's proposed definition of "corruptly"). Petitioners cannot challenge a jury instruction that is consistent with their own proposal. Fed. R. Crim. P. 52(b); see *United States* v. *Lopez-Escobar*, 920 F.2d 1241, 1246 (5th Cir. 1991) ("A party cannot complain on appeal of errors which he himself induced the district court to commit."). Additionally, petitioners' claim (10-533 Pet. 36) that "[t]he jury charge held to be plain error in *Jennings* was essentially identical to the one given by the trial court in this case," is incorrect. In *Jennings*, the jury instruction conflated "corruptly" with "intent to influence" by charging that "the government must prove * * * that [Jennings] did so corruptly, that is, with the intent to influence or reward," which erroneously "suggest-[ed] that § 666 prohibits *any* payment made with a generalized desire to influence or reward (such as a goodwill gift)." 160 F.3d at 1019-1020 (brackets in original). Here, the district courts made no such error.

[7] The court of appeals did not address McNair's argument that the Due Process Clause compels his construction of Section 666 (10-533 Pet. 24-28) because McNair did not make that argument below.

language. McNair's argument is based wholly on his erroneous view (10-533 Pet. 18-19, 22) that the court of appeals held that Section 666 does not require proof of any *quid pro quo* at all.

3. Roland Pugh argues (10-528 Pet. 21-24) that the government knowingly introduced false testimony at his trial by presenting the testimony of his son Grady to the effect that certain cash payments were made before the statute of limitations expired. The court of appeals determined that Roland Pugh had failed to show that the "testimony was actually false, much less that the government knew it was false." Pet. App. 116. Petitioner makes no effort to show that the court of appeals applied an incorrect legal standard, and his factbound challenge to its assessment of the record does not warrant this Court's review. And because there was no false testimony in this case, the court's conclusions that the "uncorrected, allegedly perjurious statements do not undermine confidence in the verdict" and that there was no "reasonable likelihood that correction" of the supposed falsehoods "could have changed the jury's evaluation of [the] overall credibility" of a government witness are similarly unworthy of review. *Id.* at 118, 120 (internal quotation marks omitted).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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